NO. 856974

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LEASA LOWY,

Respondent,

vs.

PEACEHEALTH, a Washington corporation; ST. JOSEPH HOSPITAL; and UNKNOWN JOHN DOES, Defendant.

Petitioners,

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON STATE HOSPITAL ASSOCIATION, ET AL.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Rules and Regulations

I. INTRODUCTION

The Court of Appeals' opinion addresses a limited issue of statutory construction, the meaning of "review" added by the 2005 amendment to RCW 70.41.200(3). See *Lowy v. PeaceHealth*, 159 Wn.App. 715, 720, 722-23 247 P.3d 7 (2011). The thrust of Amici's brief is that the policy behind the QA statutes, as well as this Court's case law interpreting the statutes, mandate reversal of the Court of Appeals' opinion, even without consideration of the "review" language added in 2005.

The trial court and the Court of Appeals in this case reached different results on the meaning of "review" in the 2005 amendment to the statute. But both courts understood that the decision turned on this issue, and that neither the case law nor the statute as it existed prior to the 2005 amendment supported the hospital's position.

Amici's arguments are based upon a misinterpretation of this Court's prior case law, and upon a distorted and erroneous reading of the well-reasoned opinion of the Court of Appeals. Although couching its argument in the overt terms of fidelity to precedent and prior case law, Amici seek an unprecedented expansion of the QA privilege at the expense of a plaintiff's constitutional right to discover relevant and non-privileged documents and information. Amici's arguments constitute a

rejection of the balance struck by the Court between the need for confidential communications in the QA process, and a plaintiff's right to discovery.

To the extent that Amici attack the Court of Appeals interpretation of "review" in RCW 70.41.200(3), Plaintiff relies upon her briefing in the Court of Appeals and in the Supplemental Brief in this Court, with one exception. Plaintiff notes that Amicus Washington State Hospital Association (WSHA) does not contest Plaintiff's account of the legislative history in the 2005 amendment to the QA statute. WSHA does not contest the representations to the legislature made by its lobbyist regarding the meaning and limited purpose of the amendment. *See* Respondent's Supplemental Brief at 15-17; *Lowy v. PeaceHealth*, 159 Wn. App. at 722-23; Appendix A16-20. It does not contest the statement of the Court of Appeals that this history weighs in favor of the Court's interpretation of the statute. *Id.*, 159 Wn App. at 722-23. Rather, WSHA ignores this history and its own role in the passage of the bill.

II. ARGUMENT

A. The Court of Appeals' Interpretation of the Statute Does not Eviscerate the QA Privilege or Require the Hospital to Disclose Privileged Information

Amici contend that in focusing solely on the "review" language, the Court of Appeals erred in "ignoring the separate command that

information ***'collected and maintained'*** by a QI committee is not 'subject to . . . discovery.'" Amici at 5 (emphasis added; ellipsis marks in original). The express language of the statute, however, sets out ***three*** requirements to be met before a document is given QA protection, not just the two, "collected and maintained," mentioned by Amici. The Court of Appeals did not ignore the separate command of the statute, but correctly held that three requirements must be met before materials are entitled to immunity from discovery.

In order to receive QA protection, a document must be "[1] ***created specifically for***, and [2] collected and [3] maintained by" by a QA committee. RCW 70.41.200(3) (emphasis added). The "created specifically for" requirement is critical to the holding of the Court of Appeals. The Court of Appeals was explicit in holding that the only material to be produced in discovery is material which was ***not*** created specifically for the QA committee.[1] As it noted with regard to the original trial court order which its opinion reinstated: "The only condition was that no records be disclosed that were 'created specifically for, and

[1] As Plaintiff understands it, the non-QA material Plaintiff seeks is neither collected nor maintained in the QA file. But whether or not it is collected or maintained there is irrelevant, since in order to be protected, the material must *also* be "created specifically for" the committee. The ordinary hospital records Plaintiff seeks were not created specifically for the committee. The hospital may not immunize non-protected documents simply by placing them in the QA file. *Coburn v. Seda*, 101 Wn.2d 270, 277, 677 P.2d 173 (1984).

collected and maintained by a quality improvement committee.'" *Lowy v. PeaceHealth*, 159 Wn. App. at 718; see also *id.*, at 722 (quoted at p. 1-2 of Supplemental Brief of Respondent).

Amici have ignored the statutory requirement that only documents and information "***created specifically for***" the QA committee are protected under the QA statute. Nowhere in its brief does Amici discuss the application of the "specially created for" requirement.[2] Amici is able argue that the opinion requires the hospital "to disclose privileged information," Amici at 5, only because it ignores this requirement.

Amici's failure to acknowledge or directly address the "created specifically for" requirement coupled with its unfounded charge that the Court of Appeals requires the hospital to disclose privileged information is of concern. Are Washington hospitals, represented by Amici, interpreting the QA privilege to extend to any document or information placed in the QA file, without regard to whether it was "created specifically for" the committee?

Plaintiff therefore asks the Court to reaffirm its holding in *Coburn v. Seda*, 101 Wn.2d 270, 277, 677 P.2d 173 (1984) that hospitals may not immunize medical records simply by placing them in a QA file, and that to attain QA protection, all three statutory requirements must be met.

[2] The phrase appears in Amici's brief only when it actually quotes the statute, but otherwise Amici ignore it.

Further, Plaintiff asks the Court to hold that in response to proper discovery requests, hospitals must examine the relevant QA files as well as other files for relevant non-protected responsive documents. *See generally, Magana v. Hyundai Motor America*, 167 W.2d 570, 585, 220 P.3d 191 (2009) ("a corporation must search all of its departments, not just its legal department")[3]; *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 347, 858 P.2d 1054 (1993) (smoking gun documents found in separate file on product which was related to product at issue should have been disclosed).

B. <u>The Court of Appeals' Opinion Does Not Conflict with Language in Anderson v. Breda.</u>

Amici rely heavily on its contention that *Anderson v. Breda*, 103 Wn.2d 901, 906, 700 P.2d 737 (1985) prohibits Plaintiff from developing evidence from the QA sources themselves, and that the Court of Appeals' opinion violate *Anderson*. Amici at 1, 6, 8. Amici misinterprets *Anderson* by taking by taking this single sentence out of the context of the paragraph in which it is embedded, and supplying it with a new meaning contrary to the Court's meaning.

[3] Notably, everyone agreed in *Magana* that counsel had to search the legal department for documents responsive to discovery, even though the legal department is the one department most likely to contain documents protected by the attorney-client privilege and work-product doctrine. *Magana* is instructive in this regard in light of the claim of Amici and Defendant PeaceHealth that that the hospital should not be required to search its privileged documents for unprivileged material.

Amici rests its argument on the second sentence of the following paragraph in *Anderson*.

> The second component is that only the proceedings, reports and written records of such regularly constituted committees are immune from discovery. Petitioners are not deprived of the opportunity to develop through sources other than the records of the committee proceeding the names of those who have knowledge or information concerning the subject matter of this suit. Nor are petitioners deprived of the opportunity to take appropriate discovery from those persons having personal knowledge or information of facts relevant to the case. At most, petitioners are deprived only of the opportunity to examine the record of testimony which was given at the committee proceedings and the findings of the committee."

Id., 103 Wn.2d at 906.[4]

The second sentence of the paragraph does not describe a restriction on discovery, but instead describes what is permitted in discovery. The Court plainly meant only that a plaintiff could not develop evidence from *examination* of the sources themselves by the plaintiff of QA material produced in discovery. This meaning is confirmed by the Court's statement two sentences later within the same paragraph:

> ***At most***, petitioners are deprived only of the opportunity to ***examine*** the record of testimony which was given at the committee proceedings and the findings of the committee.

[4] The paragraph from *Anderson* is lengthy, but the first four sentences place the Court's holding in context. The remaining five sentences in the paragraph cite and briefly state the holding of cases in other jurisdictions found persuasive by the Court.

Id. (emphasis added). This is the only sentence describing a restriction on discovery. By use of the phrase "at most," the Court is indicating the limits of the restriction on discovery. The only prohibition is on Plaintiff's examination of the QA record, a prohibition honored by the Court of Appeals in this case. The Court of Appeals opinion does not conflict with *Anderson.* Rather, Amici is now asking the Court to go beyond the holding in *Anderson.*

C. The Court of Appeals' Opinion Will Not Result in Chilling a Hospital's Quality Assurance Efforts

Amici argues that the Court of Appeals' ruling will "chill" quality improvement efforts and that hospital staff members "will be reluctant to report if there is any possibility that their information" will be used. Amici at 7. This Court in *Coburn*, 101 Wn.2d at 276-77, and *Anderson*, 103 Wn.2d at 905, recognized the legitimate confidentiality concerns supporting the QA privilege. The Court of Appeals also recognized those concerns in its ruling:

> In disclosing them, the hospital will not be required to disclose who participated in the review process concerning IV injuries, which incidents the hospital found relevant or important, or how it sorted, grouped, or otherwise organized those incidents. The hospital will not disclose any analysis, discussions, or communications that occurred during the proceedings of the quality assurance committee. The response to the discovery request will reveal no more than if the hospital had produced the medical records through a burdensome page-by-page search.

Lowy, 159 Wn. App. 722. The Court's ruling offers no possibility that in a medical malpractice or corporate negligence case brought by a patient against a hospital, a protected statement made to a QA committee will be disclosed or that the committee's candid self-assessment will be disclosed.

Further, Amici's argument relies upon the mistaken assumption that the Court of Appeals' opinion is unprecedented in opening up the possibility of disclosure of protected QA information. While the Court's opinion does not open up the possibility of disclosure of protected information, the ordinary operation of the statute does permit public disclosure of QA documents and information

A medical malpractice or corporate negligence plaintiff cannot obtain testimony or obtain documents and information which are protected by the QA privilege. But the same testimony, documents and information, otherwise protected, are subject to compulsory disclosure in open court in certain civil actions ***brought by health care providers***.

RCW 70.41.200(3)(c) is specific on this point. It states:

> This subsection [70.41.200(3)] does not preclude: . . .
> (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees.

Subsection (c) permits a health care provider bringing a lawsuit for restriction or revocation of staff privileges to introduce into evidence in a civil case QA information and material submitted which would otherwise be protected. Under subsection (c), the staff member who has made candid criticisms of health care to a QA committee, may find himself or herself on a witness stand in open court compelled to testify regarding these very statements, in front of a health care professional who is challenging as wrongful the loss or restriction of professional privileges. No staff member making a report or statement or candid assessment to a QA committee has any assurance that that statement will not ultimately become public under subsection (c).

Subsection (c) undercuts Amici's "chilling" argument. The existing statute does not give absolute protection to statements made to a QA committee. Any staff member making such a statement knows that he or she has no assurances that the statements will not be disclosed in open court. Amici cannot credibly argue that the Court of Appeals opinion, an opinion which does not allow any disclosure of protected statements or disclosure of the identities of persons making the statements, is as

remotely as chilling as the public disclosure permitted under subsection (c).[5]

D. The Court of Appeals' Opinion Does not Threaten the Integrity of the Quality Improvement Process

The claim of Amici that Plaintiff will be able to utilize information in the QA files to build her case ignores or misstates what the Court of Appeals' opinion permits. Amici at 9-10. The order requires the hospital to produce only documents and information which were **not** prepared specifically for the QA committee. Plaintiff is not seeking "QI-derived" evidence. The evidence sought by Plaintiff was created independently of the QA process. Plaintiff is entitled to this discovery of non-privileged material so that her experts can make their own independent assessment of the relevant facts. *See Coburn v. Seda*, 101 Wn.2d 270, 274, 677 P.2d 173 (1984). The hospital's own self-assessment in the QA process will not be disclosed to Plaintiff; Plaintiff will not be able to utilize the hospital's self-assessment in making her case.

Amici raises the specter that disclosure of the information required by the Court of Appeals may require the hospital either to allow plaintiff's

[5] To be clear, neither Dr. Lowy nor the Court of Appeals relied upon the exception in subsection (c), and, of course, and the Court's ruling does not allow the public disclosure permitted under subsection (c). Amici, however, is making "global" assertions about the operation of the QA statute and the effect of the Court of Appeals' opinion on its operation. In this context, the operation of the statute in its totality is relevant, especially as it relates to whether there is a potential for public disclosure built in to the QA process.

claim to go answered, or to waive the privilege itself. Amici at 9. This argument, however, misconceives the Court of Appeals' holding. Plaintiff will not receive privileged material. As the Court of Appeals put it:

> The response to the discovery request will reveal no more than if the hospital had produced the medical records through a burdensome page-by-page search.

159 Wn. App. at 722. The evidence produced by this discovery process is no different than in any other case involving corporate negligence in which other instances of patient care may be relevant. Plaintiff will develop her case based upon these non-privileged documents, as will the hospital develop its defense. How a plaintiff obtains this relevant, non-privileged and discoverable material has no effect on how a hospital defends itself. The admission of QA protected evidence on behalf of either party is neither warranted for required.

Amici fault the Court of Appeals for recognizing that the QA statutes should be strictly construed. Amici at 10. The Court of Appeals did no more than apply this Court's well-settled precedent that these statutes are to be strictly construed. As this Court stated in *Adcox v. COH*, 123 Wn.2d 15, 31, 864 P.2d 921 (1993):

> We have already recognized that this statute, being contrary to the general policy favoring discovery, is to be strictly construed and limited to its purposes. *Coburn v. Seda,* 101 Wn.2d 270, 276, 677 P.2d 173 (1984); *Anderson v. Breda,* 103 Wn.2d 901, 905, 700 P.2d 737 (1985).

This Court applied the rule of strict construction in *Coburn*, *Anderson* and *Adcox*, because of the policy favoring discovery, and the recognition that the QA statutes were contrary to that policy. This Court applied strict construction as an interpretative tool because of the policy favoring discovery, and without considering or finding that any particular language in the statute was ambiguous. This Court has not retreated from its emphasis on the importance of discovery. Rather, in *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009), the Court affirmed the right of discovery as part of the constitutional right of access to courts.

This Court has struck a balance between what it has identified as the legitimate purposes of the QA statutes with the fundamental right of a plaintiff to obtain discovery in a civil case. The Court of Appeals similarly interpreted the QA statute properly and in light of this Court's earlier decisions, including its holding that strict construction applied for policy reasons. Amici is asking this Court to effectively eliminate one side of the balance. In so doing, it is asking this Court not to uphold its earlier case law, but to radically alter it.

E. Amici's Contentions that the Court of Appeals Failed to Properly Address Various Aspects of the QA Statute are Without Foundation

Amici make several claims regarding the failure of the Court of Appeals to recognize certain aspects of the Quality Assurance statutes. These claims are without foundation, and are addressed below:

1. "The Court of Appeals also failed to recognize that the database itself is simply a compilation of data extracted from medical incident reports, which are expressly privileged under the statute." Amici at 6. The opinion nowhere states that the medical incident reports in this case are not privileged. Nowhere does the opinion allow the production of incident reports to Plaintiff.

2. "The Court of Appeals erroneously assumed that the fact that an incident report was submitted and compiled in the QI database means that there was, in fact, a prior negligent act that would be relevant to plaintiff's claim of corporate negligence." Amici at 7. The Court of Appeals made no such assumption. Rather, it noted only the undisputed fact that QA files would enable the hospital to identify the non-privileged "records of patients who experienced complications with IV infusions." *Lowy*, 159 Wn. App. at 718. A complication is not necessarily negligence.

This matter involves a simple discovery issue, for which the standard of relevance is broader than the standard for the admissibility of

evidence. CR 26(b)(1); *Barfield v. City of Seattle*, 100 Wn.2d 878, 886, 676 P.2d 438 (1984). The trial court specifically found that the information sought by Plaintiff was relevant. CP 109-110. Defendant PeaceHealth has never contested the relevance under CR 26(b)(1) of the requested discovery, as the Court of Appeals properly noted. *Lowy*, 159 Wn. App. at 717. Amici's argument is without merit, and is an improper attempt by a non-party to place a new issue before the Court. *See, e.g., State v. Gonzalez,* 110 W.2d 738, 752 n. 2, 757 P.2d 925 (1988) (arguments raised only by amici curiae need not be considered).

3. Amici claim that "the Court of Appeals' holding has no textual or logical boundaries," and that under the opinion as "[l]iterally read," hospital witnesses will be compelled to testify regarding the incident reports. Amici at 8. Amici fail to direct this Court to any language in the Court of Appeals' opinion which would require hospital witnesses to so testify. RCW 70.41.200(3) specifically prohibits testimony "as to the **content** . . . of such [QA] proceedings or the documents and information prepared specifically for the committee ..." (Emphasis added).[6] Nothing in the Court of Appeals' opinion authorizes testimony in violation of this statutory language.

[6]Again, under RCW 70.41.200(3)(c) this prohibition does not apply to civil actions brought by health care professionals who have suffered lost or restricted professional privileges at a hospital.

DATED this 3rd day of October, 2011.

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CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that she caused delivery of a copy of the foregoing Respondent's Answer to Amicus Curiae Brief of Washington State Hospital Association, et al. in the manner set forth below:

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